No. 10542

In the United States Circuit Court of Appeals

For the Ninth Circuit

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Appellant,

vs.

I. BROMBERG,

Appellee,

REPLY BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the District of Oregon.

HON. CLAUDE MCCOLLOCH, *District Judge.*

FRANCIS R. STARK,
60 Hudson Street, New York, N. Y.
SIMON, GEARIN, HUMPHREYS & FREED,
EDGAR FREED,
1111 Failing Building, Portland, Oregon,
WILLIAM L. JOSSLIN,
602 Pacific Building, Portland, Oregon,
Attorneys for Appellant.
WILBUR, BECKETT, HOWELL & OPPENHEIMER,
ROBERT T. MAUTZ,
Board of Trade Building, Portland, Oregon,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND

SUBJECT INDEX

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

(*Continued*) Page

No. 10542

In the United States
Circuit Court of Appeals
For the Ninth Circuit

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Appellant,

vs.

I. BROMBERG,

Appellee,

REPLY BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the District of Oregon.

Hon. Claude McColloch, *District Judge.*

The basic issue in this case is whether the Findings of the trial court that the appellant's messenger, Genevieve, was negligent and that the appellee, Mr. Bromberg, was not contributorily negligent, are supported by the evidence.

The appellee apparently believes that because he made such allegations in his complaint and the trial

court made such Findings, this court cannot set aside those Findings, even though they lack the support not only of the "clear weight of the evidence" but of any evidence at all. It is true that the appellee in his brief repeatedly makes the statement that Genevieve abruptly turned and walked directly into the appellee, but the only support found in the record for such a statement is in the appellee's own complaint (Tr. 3) and in the trial court's Findings (Tr. 14) where the allegations of the complaint in that respect are copied.

We think the law is completely clear that the findings of a court, trying a law case without a jury, must be supported by the evidence, and, what is more, "by the clear weight of the evidence." And it is clear that where the evidence is uncontroverted, the appellate court will, upon review of the trial court's findings, draw its own conclusions therefrom. The authorities recognizing these principles will be referred to presently in our discussion of the appellee's contentions.

Mr. Bromberg's case rests wholly upon the uncontradicted testimony of his witness Genevieve. The testimony of Mr. Bromberg himself as to how the accident happened is discredited and disowned by his own attorney (Appellee's Brief, pages 28 and 29); the testimony of John Goss, another witness for Mr. Bromberg, merely confirmed testimony already given by Genevieve that she apologized to Mr. Bromberg; and the testimony of James Lenhart (a witness for Western Union whose testimony appellee apparently

considers discredited) completely negatives negligence on the part of Genevieve. These were the only witnesses testifying in respect to the accident itself.

The appellee seems to recognize that the Findings are not supported by the testimony, and attempts (Appellee's Brief, pages 13, 14, 15, 19, 27-28) to find the necessary support in the trial court's alleged view of the scene of the accident and in Genevieve's demonstration or illustration of her testimony, made at the request of the court. We shall presently discuss the effect of those two matters, but we wish to call immediate attention to the fact that it is not possible from the record to determine what Genevieve's demonstration indicated, and that the record does not show that the court actually viewed the premises.

THE EFFECT OF RULE 52, FEDERAL RULES OF CIVIL PROCEDURE

The appellee in his brief repeatedly refers to Rule 52(a) of the Federal Rules of Civil Procedure which provides in part that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." On page 4 of the appellee's brief it is suggested that under Rule 52(a) the Findings of the trial court are conclusive upon this court, and that there is nothing for this court to do but affirm the judgment appealed from. The cases cited (Appellee's Brief, pages 16 and 17)

in support of that interpretation of Rule 52(a) certainly do not sustain any such proposition. In *Occidental Life Insurance Company v. Thomas,* 107 F. (2d) 876, *Maryland Casualty Company v. Stark,* 109 F. (2d) 212, and *Gates v. General Casualty Company,* 120 F. (2d) 925, the facts were not in dispute. In *Wittmayer v. U. S.,* 118 F. (2d) 808, a suit by the Federal Government for condemnation of lands, the evidence was clearly in favor of the Government and the testimony for the defendant was conflicting. In *Cherry-Burrell Co. v. Thatcher,* 107 F. (2d) 65, there was ample evidence to sustain the findings of the trial court. In *Luzier's, Inc. v. Nee,* 106 F. (2d) 130, the appellate court found that there was no evidence in the record to support the appellant's contentions. Thus, all of the cases cited by the appellee were cases either where the facts were admitted or where there was clearly sufficient evidence to sustain the findings of the trial court.

There are many decisions discussing the effect of Rule 52(a). *Luzier's, Inc. v. Nee,* 106 F. (2d) 130, cited on Page 16 of the appellee's brief, was a decision of the Circuit Court of Appeals for the Eighth Circuit, decided November 2, 1939. The brief extract from that case quoted on Page 16 of appellee's brief should be read in connection with the fuller discussion of Rule 52(a) to be found in the later decision by the same court, rendered on January 2, 1941, in *Aetna Life Insurance Company v. Kepler,* (8th Cir.), 116 F. (2d) 1, at pages 4 and 5:

"Prior to the effective date (September 16, 1938) of the Rules of Civil Procedure, the findings of fact of a trial court, in an action at law tried without a jury, were as conclusive, upon review, as a verdict of a jury, and could not be set aside by the reviewing court if there was any substantial evidence to support them. A different rule prevailed in equity cases. The findings of fact of the trial court in such cases were presumptively correct, and, unless clearly against the weight of the evidence or induced by an erroneous view of the law, would not be disturbed by a reviewing court.

"Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, provides: '* * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *.'

"The effect of Rule 52(a) was to establish a uniform standard for testing the validity of findings of fact in any case tried without a jury. The standard adopted was that which had always prevailed in equity.

"*This Court, with respect to jury-waived cases, is no longer merely a court of error which considers only questions of law. It now acts as a court of review in all non-jury cases in accordance with the practice which formerly prevailed in equity appeals.*

"*The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, are not binding upon this Court.*" (Italics added.)

And, as stated in *Kuhn v. Princess Lida of Thurn*, (3rd Cir.), 119 F. (2d) 704, at page 706:

> "The sufficiency of the evidence to sustain a trial court's conclusion or finding of an ultimate fact remains appropriate matter for an appellate court's consideration. *State Farm Mutual Automobile Insurance Co. v. Bonacci, et al.,* 8 Cir., 111 F. (2d) 412, 415."

As stated in the *Aetna Life Insurance Co.* decision quoted from above, a trial court's findings of fact must be supported not only by evidence but by *the clear weight of the evidence.* This was again clearly pointed out and applied by the Circuit Court of Appeals for the First Circuit in *Fleming v. Palmer,* 123 F. (2d) 749, 751, wherein the court stated:

> "The district judge's finding * * * must stand unless it is clearly erroneous, due regard being given to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c. *A finding of fact is clearly erroneous if it is against the clear weight of the evidence. It does not suffice that it be supported by evidence. Aetna Life Insurance Company v. Kepler,* 8 Cir., 1941, 116 F. (2d) 1; *State Farm Mutual Automobile Insurance Company v. Bonacci,* 8 Cir., 1940, 111 F. (2d) 412; *Manning v. Gagne,* 1 Cir., 1939, 108 F. (2d) 718; Federal Rules of Civil Procedure and The American Bar Institute Proceedings, page 316, et. seq., (Cleveland, 1938); Clark & Stone, Review of Findings of Fact, 4 University of Chicago Law Review 190 (1937). In determining whether the finding was correct, we shall examine documentary evidence which we are as competent to consider as the trial court, testimony on which there is no conflict, and for the most part only the testimony of Palmer and Soltero, so that the element of credibility will not be seriously involved * * *. The judgment

of the district court is reversed * * *." (Italics added.)

The Circuit Court of Appeals for the Fourth Circuit, in *United States v. Still,* 120 F. (2d) 876, 878, has also pointed out that under Rule 52(a) a finding of fact, though supported by evidence, will be set aside if it is against the weight of the evidence.

On pages 4, 19 and 20 of appellee's brief it is said that whether or not a person is guilty of negligence or contributory negligence is ordinarily a question of fact to be determined by the jury or judge trying the case. This is, of course, the law, but it does not dispense with the requirement that the party having the burden of proof on any issue shall prove his case.

Since the appellee's case must find its support in the uncontroverted testimony of appellee's witness Genevieve, or not at all, there is no conflict of testimony and no element of credibility involved, and the conclusions to be drawn from such a record are a matter for the appellate court upon review of the trial court's Findings. *G. E. Emp. Sec. Corp. v. Manning,* (3rd Cir.), 137 F. (2d) 637, 639; *Murray v. Noblesville Milling Co.,* (7th Cir.), 131 F. (2d) 470, 474; *Kuhn v. Princess Lida of Thurn,* (3rd Cir.), 119 F. (2d) 704, 706; *U. S. v. South Georgia Railway Co.,* (5th Cir.), 107 F. (2d) 3; *U. S. v. Mitchell,* (8th Cir.), 104 F. (2d) 343, 346; *Sabine Towing Co. v. Brennan,* (5th Cir.), 85 F. (2d) 478, 481.

GENEVIEVE NOT NEGLIGENT

Although appellee (Appellee's Brief, page 26) charges appellant's original brief with inaccuracies in its discussion of the evidence, we shall not here again review the evidence which we tried to carefully summarize in our original brief (pages 7-10, 19-22, 24-27), inasmuch as this court has available (Tr. 26-105) the comparatively brief but complete transcript of the evidence from which the accuracy of any statements contained in any of the briefs in respect to the evidence can be determined.

We must again point out, however, that there is no evidence whatever in the record that Genevieve made a sudden and abrupt turn from the hotel desk and walked directly into Mr. Bromberg, or that her actions and movements were other than those of a reasonably prudent person, although at least twice in the appellee's brief (pages 2 and 5) the statement is made that "Genevieve turned abruptly about and walked directly into Mr. Bromberg." The only basis for such a statement is the allegation to that effect in the appellee's own complaint (Tr. 3), and in the trial court's Findings (Tr. 14), neither of which documents is evidence of the facts.

Inasmuch as the appellant's case here does not require the giving of any credit whatever to the testimony of James Lenhart, which the appellee considers discredited (Appellee's Brief, page 27), we shall not here discuss the weight to which it is en-

titled, but wish to call attention to the fact that, in spite of the appellee's opinion of that testimony, he attempts in his brief to make use of it on at least two occasions (Appellee's Brief, pages 5 and 18.)

GENEVIEVE'S APOLOGY

The appellee (Appellee's Brief, page 6) seems to contend, or at least to intimate, that Genevieve's apology to Mr. Bromberg, while she and a bellboy were picking him up from the floor after the accident, was an admission of *negligence.* If it is an admission of anything, it is, of course, only an admission that it was she who collided with Mr. Bromberg, and there is no issue or dispute about that in this case. The appellee cannot torture this polite apology from a 17-year-old girl to an 87-year-old man into evidence of negligence.

MR. BROMBERG'S NEGLIGENCE

The undisputed evidence shows that, though Genevieve did not know of Mr. Bromberg's presence, *he was aware of her presence when he placed himself close behind her in the path she would normally take when turning from her position at the hotel desk* which he was waiting for her to leave.

That might not have been negligence had he been a vigorous man who could have withstood the brushing which he should have known would ensue, but it

certainly was negligence in a man of Mr. Bromberg's enfeebled condition.

As a man whose hearing was impaired, Mr. Bromberg was required "to exercise his sense of sight with redoubled vigilance." 38 American Jurisprudence 895. As a man who was old and feeble, and unsteady on his feet, he was not justified in taking a risk which would be nothing to a man more vigorous. Shearman and Redfield on Negligence, Sec. 107, Page 253.

It is significant that the appellee has made no attempt to answer points IV, V and VI, found on pages 14 to 17 of appellant's original brief.

THE TRIAL COURT'S ALLEGED VIEW OF THE SCENE OF THE ACCIDENT

The appellee seeks to remedy the deficiency in his evidence by reference at least twice in his brief (pages 14, 15) to a view by the trial judge of the premises where the accident occurred.

Actually, the record does not show that the trial judge viewed the scene of the accident, but only that he expressed an intention to do so (Tr. 26). But the point is that a view by a trier of fact is not evidence, and cannot take the place of evidence, nor supply evidence which is not otherwise in the record. This is pointed out in the very Oregon case cited on Page 15 of appellee's brief, *State v. Sing,* 114 Or. 267, 275,

229 Pac. 921, where the Oregon Supreme Court said:

> "The purpose of the view, under our statute, is not to take or receive evidence, but only to enable the jury, with the aid of visible objects, better to comprehend the evidence adduced upon the trial and apply the testimony to the issues: (citing cases).
>
> "* * * In *Molalla Electric Co. v. Wheeler,* 79 Or. 478 (154 Pac. 686), it was held by this court that where a tract of land in litigation was viewed by court or jury, a judgment must be rendered, not on the view had, but on the evidence introduced as explained by the view."

The same rule applies, of course, whether the view be by a jury or by a judge. *Atlantic Coast Line Railway Co. v. Hendry,* 112 Fla. 391, 393, 150 So. 598; *Zambakian v. Leson,* 79 Colo. 350, 354, 246 Pac. 268.

In a negligence action where the jurors view the premises, their findings must be based on the evidence in the case, and not upon facts disclosed by the view and not otherwise in evidence, the view being permitted simply for the purpose of enabling the jurors to understand the evidence introduced, and not for the purpose of furnishing original evidence upon which to base a verdict. *Haswell v. Reuter,* 171 Wis. 228, 233, 177 N.W. 8.

A trial judge's view of a winding stairway, on which the plaintiff fell, could not supply evidence of the peculiar construction making the stairway a trap or pitfall. *Rietzel v. Cary,* 66 R.I. 418, 424, 67 R.I. 101, 19 A. (2d) 760, 21 A. (2d) 5.

GENEVIEVE'S ILLUSTRATION IN THE COURTROOM

The appellee is likewise driven to the expedient of attempting to supply the deficiency in his evidence by referring (Appellee's Brief, pages 13, 15, 17, 27-28) to Genevieve's demonstration in the courtroom, (Tr. 56-57, 63-64).

Genevieve's illustration of her testimony, made at the request of the trial judge, does not support the court's Findings. *Actually, there is nothing whatever in the record to show what occurred during Genevieve's enactment in the courtroom,* a condition of the record for which the appellee must take the responsibility. Genevieve was the appellee's witness (Tr. 54), and if he wished the record to show what occurred in the course of Genevieve's demonstration, it was incumbent upon him to place that information in the record by means of questions and answers or statements. That was done, for instance, in the case of *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 29, 31-32, 58 S.W. 278. The action there was for an injury to plaintiff's knee, and plaintiff, while a witness, exhibited and moved his knee before the jury. By questions, answers and statements the record was made to show what the demonstration revealed.

We think that the reason the record in our case was left in its present condition is that all concerned, the witness, the trial judge and counsel, understood that Genevieve's enactment was only an illustration, performed at the request of the trial

judge, of her testimony, during which she described the accident in great detail, and the demonstration proved to be in complete accord with her testimony of normal and reasonable and non-negligent conduct on her part. If there are to be any presumptions as to what the illustration by Genevieve revealed, the conclusion must be that it was not in any way in conflict with her testimony, for it must be expected that if there *had* been any conflicts, the able and experienced counsel for Mr. Bromberg, if not the trial judge, would have called immediate attention to the discrepancies.

If an illustration by a witness in the courtroom, where there is nothing whatever in the record to show the appellate court what the illustration revealed, can be held to supply necessary evidence not otherwise in the record, simply because the trial court made findings which could be supported only by the missing evidence, then no findings could ever be set aside, and no judgment could ever be reversed, for an absence of supporting evidence, so long as the record simply showed that a witness illustrated his testimony respecting the accident. It is common practice in personal injury cases involving automobiles to have a witness illustrate by the use of miniature automobiles. If the appellee's contention is correct, under those circumstances no verdict or finding could ever be set aside for lack of supporting evidence if the record merely indicated that the witness enacted an illustration.

This demonstration by Genevieve does not furnish evidence such as that in the case of *Philadelphia & R. R. Co. v. Berg,* 274 F. 534, cited and quoted from on pages 13-14 of appellee's brief. That case is not in the slightest degree in point on the question before this court. That was an action for injuries received by a seaman when a hook broke. The plaintiff claimed that an eyebolt was so badly bent that the hook could not properly enter it and therefore broke when subjected to a strain. The defendant contended that there was no evidence from which the jury could have drawn the conclusion that the condition of the eyebolt caused the hook to break. In addition to testimony as to how the accident happened and how the hook was fastened in the eyebolt, *the hook itself was put in evidence,* and, of course, the appellate court held (page 537) that the jury could draw its conclusions from the "real evidence", the hook, as well as from the oral evidence. Of course the jury had the right to take into consideration the hook itself, which was put in evidence and was in the record, as well as to consider what witnesses orally testified about the hook. Certainly the appellee in this case can gain no assistance or comfort from the holding in the *Berg* case.

We do not claim that it was *improper* for the trial court or counsel to have Genevieve demonstrate what occurred at the time of the accident (provided, of course, the re-enactment was performed under such circumstances as to fairly illustrate what occurred),

but that *what the trial judge might have seen, which is not in the record by description or otherwise for this court to see, cannot be considered evidence to take the place of necessary proof not otherwise in the record.*

The appellee would wish this court to infer that Genevieve's demonstration was in conflict with her testimony because the trial judge found that Genevieve was negligent and that the appellee was not negligent. Such an inference is not justified for two reasons. First, the trial court's findings could have well resulted from an erroneous interpretation of the law of negligence and contributory negligence (Appellant's Original Brief, pages 10-16) ; and second, if any inference as to what the illustration revealed is to be indulged in, we think, as we have already said, that the assumption must be that the demonstration was not at variance with Genevieve's oral testimony. If it had been, either the trial judge or the appellee's counsel, who tried the case so vigorously, would have quickly called attention to any such variance at some time during or subsequent to Genevieve's two demonstrations (Tr. pages 56-57, 63-64).

MR. BROMBERG'S TESTIMONY

Appellee's brief (pages 28-29) takes the appellant to task for pointing out to the court that Mr. Bromberg's testimony furnished no support whatever for the trial court's findings, although it was admitted

by Mr. Bromberg's counsel at the trial (Tr. 54) and in the appellee's brief (page 29) that Mr. Bromberg's version of the accident was not to be accepted. The appellee (Appellee's Brief, page 29) goes on to cite two cases to the effect that a plaintiff in a personal injury case may recover if he produces sufficient testimony from other witnesses even though his own testimony is too weak to support recovery. Of course that is the law, but our point is that the trial court's Findings are not supported by the testimony of any of the witnesses.

THE RULE IN THE PHILLIPS CASE

The appellant in its original brief (pages 17, 28-30) called attention to the line of authorities holding that an employer is not liable for the "negligent pedestrianism" of his employee. The appellee (Appellee's Brief, pages 20-25, 30-33) casts reflection on that principle by stating that the leading case, *Phillips v. Western Union Telegraph Company,* 270 Mo. 676, 195 S.W. 711, has "no pride of ancestry and no hope of posterity", and by citing a number of cases in which recovery has been allowed against an employer for the negligent action of his employee while on foot. While it is not in any way necessary for this court to approve the doctrine of the *Phillips case* in order to set aside the trial court's findings as being unsupported by the evidence, we should point out that in all the cases cited by the appellee on the subject (Appellee's

Brief, pages 6-9, 20-25, 30-33) there is an element of hurrying, running, frolicking or wrestling.

In *Tighe v. Ad Chong,* 112 Pac. (2d) 20, (cited on pages 9, 22 and 25 of Appellee's Brief), the defendant's delivery boy suddenly emerged backwards through a doorway, whirled around quickly and collided with plaintiff. In *Salmons v. Dun and Bradstreet,* 162 S.W. (2d) 245, (cited on pages 24 and 25 of Appellee's Brief), the defendant's messenger boy negligently pushed a revolving door with such speed and force as to injure plaintiff. In *Schediwy v. McDermott,* 113 Cal. App. 218, 298 Pac. 107, (cited on pages 6 and 25 of Appellee's Brief), the defendant's delivery boy came out of his shop "at a good brisk pace, faster than a walk" and collided with plaintiff. In *Price v. Simon,* 62 N.J.L. 153, 40 A. 689, (cited on pages 7 and 25 of Appellee's Brief), the defendant's ice delivery man returning from a customer's house *ran* into and injured a child. In *Ryan v. Keane,* 211 Mass. 543, 98 N.E. 590, (cited on pages 7 and 25 of Appellee's Brief), defendant's stable man crossed defendant's stable yard in a hurry, called out "get out of my road" and pushed plaintiff aside. In *Missouri, K. & T. Railway v. Edwards,* 67 S.W. 891, (cited on pages 8 and 25 of Appellee's Brief), defendant's brakeman *ran* against plaintiff and knocked him under the train. In *Hobba v. Postal Telegraph-Cable Company,* 141 Pac. (2d) 648, (cited and quoted from at length in the Appendix to Appellee's Brief, pages 30-33), two of defendant's messenger boys, while

scuffling and running, on a public street, *ran* into plaintiff. *Chiles v. Metropolitan Life Insurance Company,* 91 S.W. (2d) 164, (cited on page 22 of Appellee's Brief), involved a collision between two automobiles.

So far as our research discloses, and presumably so far as the attorneys for the appellee have been able to find, not a single case has yet held that a plaintiff may recover from an employer for injuries sustained as a result of unintentional body contact with a *walking* employee. It will be recalled that in our case Genevieve, at the time of the accident, was not running, hurrying or frolicking in any way (Tr. 57, 65).

STANDARD OF CARE

In appellant's original brief (pages 11-13) it was stated that in order for an act to be negligent a reasonable man in the situation of the actor must be able to foresee that the act will cause some injury to another. In answer to that, the appellee (Appellee's Brief, pages 9-12) urges that it is not necessary for the actor to foresee the precise injury resulting from an act in order for the act to be negligent. To this, of course, we agree; but our point is that a reasonably prudent person in Genevieve's situation could not have foreseen that her conduct, as the undisputed evidence shows it to have been, would cause any injury to anybody.

In all of the cases cited on the point by the ap-

pellee (Appellee's Brief, pages 9-12) the courts found that a reasonably prudent person should have foreseen that some injury would result from the acts complained of. In the case of *Miami Quarry Co. v. Seaborg Packing Co.,* 103 Or. 362, 204 Pac. 492, for example, the Oregon Supreme Court specifically held that the defendant should have foreseen that a barge permitted to break loose from its moorings might be carried by the forces of nature (wind, waves and tide) and cause some damage.

CONCLUSION

There are no matters of credibility or disputed testimony involved in the question before this court. The evidence is here, and if the Findings are against the "weight of the evidence" they must be set aside and the judgment reversed. And, *a fortiori,* this is true if there is no substantial evidence, and, of course, if there is no evidence at all, to support the Findings.

The appellee's complaint asserted that Genevieve was negligent, and the trial court found negligence, but the evidence does not show negligence. Genevieve turned from the hotel desk in a normal and reasonable manner, and, in doing so, came in contact with Mr. Bromberg who had, entirely unknown to her, placed himself closely behind her and *directly in the path that she or any other reasonable person would take in turning from the desk.* She was not negligent

unless *as a matter of law* she was required, before turning from the desk, to look around and ascertain the presence of anyone who unknown to her might have placed himself closely behind her and directly in her path. The negligence in this case was not Genevieve's. It was Mr. Bromberg's.

Respectfully submitted,

FRANCIS R. STARK,
SIMON, GEARIN, HUMPHREYS & FREED,
EDGAR FREED,
WILLIAM L. JOSSLIN,
Attorneys for Appellant.